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In the
United States Court of Appeals
for the
Ninth Circuit

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TARLA MAKAEFF, BRANDON KELLER, ED OBERKROM,
SONNY LOW, J. R. EVERETT and JOHN BROWN,

Plaintiffs and Respondents,

v.

TRUMP UNIVERSITY, LLC, and DONALD J. TRUMP,

Defendants and Petitioners.

*Appeal from an Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification
Entered on February 21, 2014 by the United States District Court for the Southern District of California
Case No. 3:10-cv-0940-GPC-WVG · Honorable Gonzalo P. Curiel*

**DEFENDANTS TRUMP UNIVERSITY, LLC AND DONALD J. TRUMP'S
PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRCP 23(f)**

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CORPORATE DISCLOSURE STATEMENT

Petitioner Trump University, LLC asserts that it has no parent corporation and there is no publicly held corporation that owns ten percent or more of its stock.

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I. INTRODUCTION

Defendants respectfully request this Court to grant this petition for immediate appeal under Federal Rule of Civil Procedure 23(f). The petition seeks to review the District Court's order granting certification of a plaintiff consumer class of approximately 2,500 students who attended defendants' real estate investment training programs. The order is manifestly erroneous as a matter of law because the District Court failed to follow the controlling authority of *Wal-Mart Stores, Inc. v. Dukes*¹, *Mazza v. Am. Honda Motor Co.*², *Poulos v. Caesar's World, Inc.*³ and *Comcast v. Behred*.⁴

First, The District Court failed to apply the mandated precedent of the United States Supreme Court in *Wal-Mart v. Dukes* that a classwide proceeding must generate **common answers**. The District Court determined that three questions were common to the class, but then it never analyzed nor even considered whether common answers were possible, let alone exist. Had the District Court conducted that analysis as required by law, it would have concluded that plaintiffs failed to satisfy Rule 23 requirements.

¹ 131 S. Ct. 2541, 180 L.Ed.2d 374 (2011)

² 666 F.3d 581 (9th Cir. 2012)

³ 379 F.3d 654 (9th Cir. 2004).

⁴ 133 S. Ct. 1426, 185 L.Ed.2d 515 (2013)

Second, the District Court failed to follow this Court's recent and dispositive holding in *Mazza* that class certification in this type of case allows a presumption of reliance only when **all** class members are exposed to the **same** alleged misrepresentations. The District Court concluded that the presumption was met, despite the undisputed fact that not even all named plaintiffs were so exposed, much less all class members.

Third, the District Court failed to follow the mandated precedent of the United States Supreme Court in *Comcast* by finding that plaintiffs presented an adequate method for determining damages, when in fact they presented **no method** beyond demanding a full refund for every class member.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Trump University⁵

Trump University ("TU") began operations in 2005. It was the idea of educational entrepreneur Michael Sexton, who wanted to sell on-line real estate education programs. Mr. Trump met extensively with Mr. Sexton to discuss overall methods and goals and selected original faculty members. They included Prof. Gary Eldred of Stanford and Attorney JJ Childers – a noted wealth management specialist.⁶

⁵ The facts in Section II are taken from Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification. ECF 138 and Supporting Exhibits ECF 139-143.

⁶ ECF 139, Exs. 1-4.

TU introduced live seminars in 2007 and later introduced the mentor program involving individualized one-on-one training of students by experienced real estate professionals. As the TU faculty grew, Mr. Trump continued to meet many of the instructors, and he approved all of their resumes.

By 2009, TU provided more than 200 different programs taught by more than 40 instructors and 35 mentors. The programs ranged from a free 90-minute preview, to a 3-day seminar in basic real estate investing, to 3-day, in-person, one-on-one mentoring, to advanced workshops, to individualized coaching as well as other customized programs.⁷

B. The Diversity of TU Students and Their Experiences with TU

Different Programs and Different Instructors: Approximately 6,500 students across the country paid between \$995 and \$1,995 for the 3-day basic seminar. This seminar was taught hundreds of times by about 20 instructors. The presentations varied by about 30-35%. Approximately 750 students paid between \$10,000 for three 3-day workshops, and \$35,000 for five 3-day workshops, plus a 3-day customized personal mentorship with 35 different mentors, followed by year-long mentor access.

⁷ ECF 139, Ex. 6.

Different Student Evaluations and Experiences: There is an extensive record of 10,000 student evaluations of programs and mentors, 84 testimonials, and 14 declarations.⁸ 97% of all evaluations for all TU events rated TU's training, instructors, and mentors 4.9 on a 1-5 scale.⁹ That 97% includes five of the six named Plaintiffs who each rated TU a perfect "5" and provided comments such as "*Training was excellent, best real estate training I have gone to.*"¹⁰ Lead Plaintiff Makaeff also gave a videotaped testimonial after she completed ten months of TU seminars and mentoring and said that her instructors and mentors were "*great*" and "*awesome.*"

Thousands of other students provided similar handwritten statements on their evaluations, such as: "*learned more in the last three days than the last 15 years*"; "*exceeded expectations,*" and "*Trump University is some of the best money I've ever invested.*" The evaluations also confirm that students had very different reasons to attend TU. For example: "*I came to this seminar just to be a better resource for my clients.*" Finally, many students made money on their real estate investments shortly after their TU training. The point is that the class is completely diverse in what they expected, what they purchased, what they received and the results of their training.¹¹

⁸ ECF 139-5, Exs. 11-14.

⁹ ECF 139-5, Exs. 11 & 12; ECF 143, Ex. 24.

¹⁰ ECF 143, Ex. 25.

¹¹ ECF 143, Exs. 19, 20, 14(a-n), 22 and 23.

C. The Class Action

This case was filed in 2010 by Ms. Makaeff. Other named plaintiffs joined later that year, some of whom have since been dismissed.

D. The Motion for Certification

The moving papers for class certification were filed in September 2012. The original moving papers sought certification for a nationwide class divided into 14 subclasses.¹²

E. The Class Certification Ruling

The District Court granted certification of a class totaling about 2,500 former TU students, divided into five subclasses in three states: California, New York, and Florida. Three of the subclasses are based on the statutes of those three states barring unfair trade practices. The remaining two subclasses are based on the statutes of California and Florida barring “elder abuse.” The District Court denied certification of another eight subclasses based on state common law claims.

¹² Order: (1) Granting in Part and Denying in Part Plaintiffs’ Motion to Certify Class Action (ECF 298), p. 2, attached as Exhibit 1 (“Order”).

III. APPLICABLE LEGAL STANDARD

FRCP Rule 23(f) permits a timely discretionary interlocutory appeal from a District Court order granting or denying a class action certification. This Court has stated three principles justifying an interlocutory appeal of class certification.¹³

Defendants respectfully submit that the applicable principle here is “manifest error in the district court’s certification opinion.”¹⁴ For that principle to result in reversal of the certification order, this Court has instructed as follows:

“The error in the district court’s decision must be significant; bare assertions of error will not suffice. Any error must be truly ‘manifest,’ meaning easily ascertainable from the petition itself. . . .”¹⁵

When a District Court ignores binding precedent, permission to appeal is warranted.¹⁶ As noted above, the District Court committed three crucial errors of law, each mandated by U.S. Supreme Court or Ninth Circuit precedent. *Chamberlan* specifically recognized that these errors merit review and reversal.

IV. QUESTIONS PRESENTED

1. Whether the District Court committed reversible error by ignoring the controlling Supreme Court authority of *Wal-Mart* when: (a) common

¹³ *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005).

¹⁴ *Id.* at 955.

¹⁵ *Id.* at p. 959 (citation omitted).

¹⁶ *Id.* at 962.

answers among the class do not exist; (b) common evidence cannot resolve an issue that is central to the validity of the claim in one stroke; and (c) material differences among class members show that Rule 23 requirements of commonality and predominance cannot be met.

2. Whether the District Court committed reversible error when it ignored the controlling Ninth Circuit authority of *Mazza* that set forth when misrepresentations are sufficiently widespread and uniform to warrant class treatment, and instead the District Court created its own lower standard.
3. Whether the District Court committed reversible error when it ignored the controlling Supreme Court authority of *Comcast* requiring plaintiffs to propose a legally and practically workable method for computing damages.

V. REASONS THE PETITION SHOULD BE GRANTED

A. The District Court Erred in Failing to Apply *Wal-Mart* to Determine Whether Class Certification Is Appropriate When No Common Answers or Even Common Evidence Can Be Generated By the Certification.

The District Court determined that three questions were common to the class: (1) whether Defendants misrepresented that Trump University was an “accredited university”; (2) whether Defendants misrepresented that Donald

Trump was heavily involved in TU and “hand-picked” the TU instructors; and (3) whether Defendants made misrepresentations about “year-long” mentoring and interactive support provided by TU after various programs¹⁷

The District Court erred in its consideration of commonality when it failed to consider whether these common questions were susceptible to common answers. As the Supreme Court noted in *Wal-Mart*, one can almost always find common questions in any multi-party litigation; the key to class certification, however, is whether class certification can help generate common answers to these questions.¹⁸ The *Wal-Mart* Court was clear that common contentions “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.”¹⁹

Because TU students: (i) saw different ads—some without the purported misrepresentations--and some saw no ads; (ii) attended different programs taught by dozens of different instructors who made diametrically opposed representations about accreditation, and some made no representations about accreditation; (iii) had different instructors and mentors—some of whom indisputably were “hand-

¹⁷ Order, p.14

¹⁸ *Walmart*, 131 S.Ct. at 2551.

¹⁹ *Id.* at 2545.

picked” by Mr. Trump; and (iii) got different support and results from their TU training, including some members who received far longer than one year of support, each student could not “have suffered the same injury” as required by *Wal-Mart*. The District Court never considered this issue. Here are two examples.

1. Common Evidence Does Not Exist to Answer the Question Whether Donald Trump Hand-Picked All Instructors.

There is no dispute that TU instructors and mentors were not selected in the same way. Mr. Trump personally met with and “hand-picked” the original TU instructors and mentors, including Prof. Gary Eldred of Stanford and Attorney JJ Childers. Prof. Eldred taught live programs and mentored hundreds of TU students throughout 2007. Between 2007 and 2010, JJ Childers taught thousands of TU students, including lead plaintiff Makaeff.²⁰

Even if the District Court assumed that Mr. Trump’s review of resumes for other TU presenters did not constitute “hand-picking” for those, the issue cannot be resolved by common evidence. It cannot because many class members were taught by “hand-picked” Prof. Eldred and/or JJ Childers, while others were not.

The point is that there is no common evidence that can resolve this issue by its truth or falsity. The issue turns on which students were taught by which instructors, and thus requires individual inquiry of each class member. The

²⁰ ECF 143-1, Ex. 45.

District Court never evaluated this issue. Had the District Court applied the *Wal-Mart* standard to the “hand-picked” common question, the District Court would have concluded that plaintiffs did not meet the rigorous requirements of Rule 23 because there is no “common answer.”

2. Common Evidence Does Not Exist to Answer the Question Whether All Members Received Year-Long Support and Mentoring.

What each student received was quite different, depending both on the instructor’s and student’s efforts. Named plaintiffs Everett and Oberkrom admitted that they each chose not to even meet with their mentors.²¹ Their situation is totally different from students who received ongoing support far longer than one year. Again, the point is that there is no **common answer** to the “year-long” common question posed by the District Court. The evidence varies for each instructor as well as each student.

The “year-long” inquiry further depends on which programs students purchased. 80-90% of the class did not even purchase a mentorship. Many students purchased only the initial three-day introductory real estate program, which included no mentorship. Many students who attended that introductory program voluntarily chose to have no further contact with TU. By contrast, other

²¹ ECF 143-1, Ex. 60-5895-96.

students purchased multiple three-day workshops and received support from their mentor for over a year or longer.

What **common** evidence can resolve the “year-long” question for **all** class members on this issue by its truth or falsity? The District Court never evaluated this issue. Had the District Court evaluated the issue, it would have concluded that no common answer or even common evidence exists.

B. The District Court Erred by Creating Its Own Standard of “Highly Likely” Exposure to Advertisements, in Direct Contravention of This Court’s Holding in *Mazza*.

1. The District Court Did Not Enforce the Required Uniform Exposure of All Class Members to the Same Misrepresentations

The District Court made a presumption of reliance based on an erroneous finding that the **same** three misrepresentations were communicated to **all** class members as required by this Court’s controlling opinion in *Mazza v. Am. Honda Motor Co.*²² However, the District Court noted facts indicating that these three misrepresentations were not even communicated to all the named plaintiffs, much less all class members.

The *Mazza* Court gave very clear guidance concerning when a presumption of reliance could be applied in a putative consumer class action based on alleged misrepresentations, exactly like this case:

²² 666 F.3d 581 (9th Cir. 2012).

“...[T]he misrepresentations at issue here do not justify a presumption of reliance. This is so primarily because it is likely that many class members were never exposed to the allegedly misleading advertisements . . . (‘An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class.’); *Cohen v. DIRECTV, Inc.*, 178 Cal.App.4th 966, 980 (2009 (‘[California law does not] authorize an award . . . on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.’))

...

.... A presumption of reliance does not arise when class members ‘were exposed to quite disparate information from various representatives of the defendant.’ *See Stearns*, 655 F.3d at 1020 (9th Cir. 2011). California courts have recognized that *Tobacco II* does not allow ‘a consumer who was never exposed to an alleged false or misleading advertising . . . campaign’ to recover damages under California’s UCL. *Pfizer, Inc. v. Superior Court*, 182 Cal.App.4th 622, 632 (2010); *Davis-Miller*, 201 Cal.App.4th at 633. For everyone in the class to have been exposed to the omissions, as the dissent claims, it is necessary for everyone in the class to have viewed the allegedly misleading advertising. Here the limited scope of that advertising makes it unreasonable to assume that all class members viewed it. *Pfizer, Inc.*, 182 Cal.App.4th at 633-34.

...

In the absence of the kind of massive advertising campaign at issue in *Tobacco II*, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading.”²³

²³ *Id.* at 595-96 (West citations omitted).

The District Court failed to impose that standard on lead named plaintiff Makaeff. She testified that she never saw any advertising by TU.²⁴ She also testified that she never attended TU's free 90-minute introductory program, which supposedly was the primary method used by TU to communicate the alleged misrepresentations to its students.²⁵ The undisputed facts are that of the four named plaintiffs, one of them never saw a TU ad nor attended a TU free preview. Moreover, none of the four named plaintiffs saw the same TU ads.²⁶

Similarly, the District Court determined that a common question existed as to the alleged misrepresentation that TU was an "accredited university." But the required *Mazza* threshold issue therefore is whether TU represented to **all** class members that Trump University was "accredited." Two named plaintiffs were never told that TU was accredited. Moreover, former TU phone sales employee Jason Nichols-fired by TU and now represented by plaintiffs' counsel- testified that he specifically told consumers and putative class members that TU was not accredited.²⁷ Plaintiffs allege that some students were told that TU was accredited, but the point is that **all** students did not receive that same alleged

²⁴ ECF 143, Ex. 32.

²⁵ Order, p. 8.

²⁶ ECF 143, Ex. 33.

²⁷ ECF 143-1, Ex. 42-5688.

misrepresentation. In *Gonzalez v. Proctor & Gamble Co.*²⁸, another judge of the District Court addressed the identical issue, and correctly concluded that a presumption of reliance is not available:

Plaintiff directs the court's attention to California case law suggesting that in some consumer fraud actions, reliance may be inferred on a class-wide basis. However, the Ninth Circuit has stated that presumption of reliance typically is only permitted in securities fraud cases, and only in cases based on omissions as opposed to affirmative representations.

...

The Court finds that this case is controlled by those California cases that refused to certify a class when the plaintiffs could not allege that the same representations were specifically made to each class member, thus preventing the court from permitting an inference of reliance.²⁹

If the named plaintiffs and class representatives cannot meet the *Mazza* standard of all being exposed to the same misrepresentations, then the entire plaintiff class cannot meet that standard either. The District Court was bound to enforce the *Mazza* standard in this case, but did not. That was a manifest error of law under *Chamberlan*, and supports review of the District Court's certification ruling under Rule 23(f).

²⁸ 247 F.R.D. 616 (S.D. Cal. 2007)

²⁹ *Id.* At 623-24 (emphasis added).

2. The Further Error of the District Court – Replacing the Strict *Mazza* Standard with a “Highly Likely” Standard

The District Court did not only fail to apply the strict *Mazza* standard requiring all class members to be exposed to the same misrepresentations. The District Court also invented its own standard to replace it, namely an unprecedented “highly likely” standard.

The District Court began with an accurate statement of the law: “The critical question in this case, as posed in *Tobacco II*, is whether the putative class members were exposed to the same alleged misrepresentations.”³⁰ The District Court then acknowledged that TU did not have the “long-term advertising campaign” in *Tobacco II*, and was much more similar to the “limited advertising” in *Mazza*, although it was more targeted to its intended audience.

However, the District Court then abandoned the strict *Mazza* standard for its own “highly likely” standard, and confused that unlawful standard with the unrelated objective standard for a material misrepresentation:

“The effect of [the TU] campaign was to make it highly likely that each member of the putative class was exposed to the same misrepresentations. There is substantial evidence that class members paid for TU seminars for reasons that track the advertising and promotional information provided in the highly orchestrated campaign. The Court finds substantial evidence

³⁰ Order, p. 22.

that members of the California subclass were “likely to be deceived” by TU’s advertisements.”³¹ (emphasis added).

Whether the class was “likely to be deceived” by TU’s misrepresentations has no bearing on whether all class members were exposed to those same misrepresentations in the first place. We know they were not so exposed, because we know their putative class representatives were not. Under *Mazza*, the District Court was bound to reject the presumption of reliance without uniform exposure. The failure to do so was manifest error under *Chamberlan*, and supports review of the District Court’s certification ruling under Rule 23(f).

C. The District Court Erred by Failing to Apply the Rigorous Analysis Required By *Poulos v. Caesar’s World, Inc.*

The District Court failed to address the issue of the “knowledge, motivations, and expectations” of each class member, as required by *Poulos v. Caesar’s World, Inc.*³² The actual impact on the students of the ads, materials and training must be determined. That can only be done by individual inquiry into what ads – if any – they saw, what representations – if any – were made to them, what personal expectations they had, what courses they took and why, and how they used their training afterwards. The “rigorous analysis” for certifying a class on

³¹ Order, p. 22.

³² 379 F.3d 654, 655 (9th Cir. 2004).

predominance requires weighing individual factors against class-wide ones. The District Court never addressed the issue or undertook that analysis.

This Court has provided excellent guidance for that weighing. *Poulos* held that a diverse group of potential claimants requires individual inquiry when that diversity includes differing “knowledge, motivations, and expectations.”³³ *Poulos* involved RICO claims brought by a putative class of gamblers who used video poker or electronic slot machines.³⁴ The “misrepresentation” was that these devices looked like hand-dealt poker games and mechanical slot machines, but actually delivered pre-determined computer-driven outcomes unknown even to experienced gamblers.³⁵

The *Poulos* District Court denied class certification on the ground that individualized reliance issues related to proof of causation would predominate over common questions, and this Court affirmed.³⁶ This Court explained:

“Gamblers do not share a common universe of knowledge and expectations – one motivation does not ‘fit all.’ Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence

³³ *Id.*

³⁴ *Id.* at 658.

³⁵ *Id.* at 659-61.

³⁶ *Id.* at 658.

their perceptions. Still others, in the spirit of a calculated risk, may have played fully aware of how the machines operate. Thus, to prove proximate causation *in this case*, an individualized showing of reliance is necessary.”³⁷

This Court concluded that generalizations about gamblers would not suffice:

“Indeed, there may be no single, logical explanation for gambling – it may be an addiction, a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things.... Consequently, we conclude that classwide circumstantial evidence would not suffice to prove causation in this case.”³⁸.

Other courts in the Ninth Circuit have insisted on individual inquiry into the individual motivations and decisions of potential class members due to the unique nature of the class, claims, or facts at issue. *See, e.g., Tanedo v. East Baton Rouge Parish School Bd.*³⁹ (Filipino teachers recruited for US work, but then overcharged for purported visa fees by employer, denied certification of fraud claims because individual inquiry was needed to determine their reasons for immigrating); *Davis v. Homecomings Financial*⁴⁰ (claimed reliance by class of home loan borrowers raised issues of credibility and state of mind needing individualized consideration).

In this case, the named plaintiffs and all 2,500 class members here had varying “knowledge, motivations, and expectations” before, during, and after their

³⁷ *Id.* at 665-66 (emphasis in original).

³⁸ *Id.* at 668

³⁹ 2011 WL 7095434, *9 (C.D. Cal. 2011)

⁴⁰ 2006 WL 2927702, *7 (W.D. Wash. 2006)

TU training. The District Court never undertook the *Poulos* analysis. If it had, the District Court would have concluded that plaintiffs did not meet the predominance requirement of Rule 23. That failure was manifest error under *Chamberlan*, and supports review of the District Court's certification under Rule 23(f).

D. The District Court Erred in Failing to Apply *Comcast* and Not Requiring Plaintiffs to Present a Legally and Practically Sufficient Method of Determining Damages for All Class Members.

Supreme Court precedent requires that where a proposed Rule 23(b)(3) class involves individualized damages, the plaintiff must provide the district court with a method that is capable of measuring damages on a classwide basis.⁴¹ Without such a method, *Comcast* instructs that the predominance requirement of Rule 23(b)(3) cannot be met, as “questions of individual damage calculations will inevitably overwhelm questions common to the class.” Here, the only “method” of measuring damages proposed by plaintiffs was not a measurement at all, but merely a demand that plaintiffs receive all money they paid, **regardless of the value they actually received for their money.**

Establishing accurate damages, if any, will require individual inquiry of each class member because the named plaintiffs and class members got different value from their TU programs. Class members purchased very different programs, some

⁴¹ *Comcast*, 133 S. Ct. at 1433.

with mentorships and many without. Some students made money using their training and some never tried. Some valued their experience as “worth it,” and others attended solely to network. Some started careers in real estate, while others wanted the information just to better manage their family real estate portfolios. Many class members received extra classes and mentoring for free. Some students received partial refunds, and some of those signed releases.

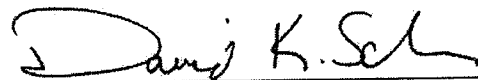
The point is that the value each class member received was unique, and so their potential damages are equally unique.⁴² The District Court gave no consideration to these differences, and plaintiffs offered no methodology at all for calculating damages or differences in damages among class members. The District Court’s failure to apply *Comcast* was manifest error under *Chamberlan*, and supports review of the District Court’s certification ruling under Rule 23(f).

VI. RELIEF SOUGHT

Defendants respectfully request that this Court grant their petition and accept review of the District Court’s order of 2/21/14 granting class certification.

Dated: March 7, 2014

Respectfully submitted,
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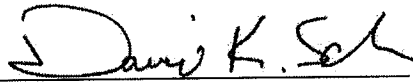
⁴² ECF 139-5, Exs. 11-14, ECF 143, Exs. 21, 25 and 27.

CERTIFICATE OF COMPLIANCE

This Petition complies with the page limitations of Fed. R. App. P. 5(c) because this brief is twenty (20) pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface of 14 points.

Dated: March 7, 2014

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DONALD J. TRUMP

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants state that *Cohen v. Donald J. Trump*, Case No. 13-cv-2519-GPC-WVG is related to the present case.

EXHIBIT 1

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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 TARLA MAKAEFF, et al., on Behalf
12 of Herself and All Others Similarly
Situated,

13 Plaintiffs,

14 vs.

15 TRUMP UNIVERSITY, LLC, et al.,
16 Defendants.

17
18 AND RELATED COUNTERCLAIM
19

Case No. 3:10-cv-0940-GPC-WVG

ORDER:

**1) GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO CERTIFY CLASS
ACTION, APPOINT CLASS
REPRESENTATIVES, AND
APPOINT CLASS COUNSEL**

[Dkt No. 122.]

**2) DENYING MOTIONS TO
STRIKE**

[Dkt. Nos. 138-2, 196, 211.]

20
21 Plaintiffs Tarla Makaeff, Brandon Keller, Ed Oberkrom, Sonny Low, J.R.
22 Everett and John Brown have filed a putative class action complaint against Trump
23 University, LLC ("TU")¹ and Donald J. Trump ("Donald Trump"). The gravamen
24 of the action is that Defendants made false representations in advertisements,
25 mailings and programs regarding Donald Trump's involvement in TU and the

26 ¹ After the filing of this action, the New York Department of Education demanded that
27 Trump University remove the word "University" from its title. Trump University changed its
28 name to Trump Entrepreneur Initiative, LLC. As the complaint was filed prior to the change in
name, and as neither party requested to substitute Defendants, the Court continues to refer to the
Defendant as Trump University.

1 contents of the programs that students would receive. On September 24, 2012,
2 Plaintiffs filed a motion for class certification, appointment of class
3 representatives, and appointment of class counsel. (Dkt. No. 122, "Pl. Mtn.") The
4 proposed nationwide class is comprised of:

5 All persons in the United States who purchased a Trump
6 University 3-day live "Fulfillment" workshop and/or a "Elite"
7 program ("LiveEvents") within the applicable statute of
8 limitations and have not received a full refund. Excluded from
9 the class are Defendants, their officers and directors, families
10 and legal representatives, heirs, successors, or assigns and any
11 entity in which Defendants have a controlling interest, any
12 Judge assigned to this case and their immediate families.

11 (Pl. Mtn. at 13.)

12 Plaintiffs also propose the certification of 14 subclasses, including three
13 single-state subclasses represented by Plaintiffs who reside in California, New
14 York, and Florida alleging violations of deceptive practices laws in their home
15 states. (Dkt. No. 122-7, "Proposed Trial Plan.")²

16 The motion has been fully briefed. (Dkt. Nos. 138, 195.) In addition to the
17 pending motion for class certification, the parties have filed and fully briefed
18 several related motions to strike and objections to evidence. (Dkt. Nos. 138-4,
19 "Def. Obj. to Evidence," 195-9, 213; Dkt. Nos. 138-2, "Def. Mtn. to Strike," 192,
20 212; Dkt. Nos. 196, "Pl. Mtn. to Strike," 210, 233; Dkt. Nos. 211, "Def. Obj. to
21 Reply," 221, 230.)

22 A hearing was held on November 8, 2013. Following careful consideration
23 of the parties' oral arguments, legal briefings and applicable law, and for the
24 reasons set forth below, the Court hereby **GRANTS** in part and **DENIES** in part
25 Plaintiffs' motion.

26 ² Plaintiffs filed a notice of correction following the November 8 hearing, providing an
27 amended proposed class definition and six potential subclasses. (Dkt. No. 279.) Defendants
28 replied. (Dkt. No. 280.) To the extent that Plaintiffs fail to cite any basis for the Court to allow ex
parte amendments to the proposed class definition, the Court declines to address any amended
proposed class definitions absent formal motion and the opportunity for full briefing.

I. BACKGROUND

A. Procedural Background

On April 30, 2010, Plaintiff Tarla Makaeff ("Makaeff") filed a class action complaint against Trump University, LLC, alleging violations of California, New York, and Florida consumer statutes as well as several common law causes of action. (Dkt. No. 1.) On May 26, 2010, Defendant Trump University, LLC, filed a counterclaim against Plaintiff Makaeff for defamation. (Dkt. No. 4.)³

The complaint has been amended a number of times, ultimately resulting in the current operative pleading, the third amended complaint (TAC), filed September 26, 2012. (Dkt. No. 128.) The TAC named Plaintiffs include Tarla Makaeff, Brandon Keller, Ed Oberkrom, Sonny Low, J.R. Everett, and John Brown. Defendants include Trump University, LLC, Donald J. Trump, and DOES 2 through 50 ("Defendants"). On January 30, 2013, the case was transferred to the undersigned judge. (Dkt. No. 190.)

B. Complaint's Allegations

The TAC alleges the following causes of action: (1) unlawful, fraudulent and unfair business practices in violation of Cal. Bus. & Prof. Code section 17200; (2) deceptive practices and misrepresentation in violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code section 1750 *et seq.*; (3) untrue and misleading advertisement in violation of Cal. Bus. & Prof. Code section 17500 *et seq.*; (4) breach of contract against Trump University; (5) breach of the implied covenant of good faith and fair dealing against Trump University; (6) money had and received; (7) negligent misrepresentation; (8) fraud; (9) false promise; (10)

³ On June 30, 2010, Plaintiff Maekoff filed a motion to strike Defendant's counterclaim against her pursuant to California Code of Civil Procedure section 425.6, anti-SLAPP statute, which the Court denied. (Dkt. Nos. 14, 24.) Following Plaintiff's appeal, the U.S. Court of Appeals for the Ninth Circuit reversed this Court's order denying Plaintiff's motion to strike and remanded to the District Court for further proceedings. (USCA Case No. 11-55016; App. Dkt. No. 60.) Defendant/Appellee Trump University, LLC, filed a petition for en banc rehearing, which the Ninth Circuit granted. (App. Dkt. No. 61.) On November 27, 2013, the Ninth Circuit issued an order denying rehearing en banc. (Dkt. No. 281.)

1 deceptive acts and practices in violation of § 349 of New York's General Business
2 Law; (11) financial elder abuse in violation of Cal. Welf. & Inst. Code § 15600, *et*
3 *seq.*; (12) unfair competition, practices, or acts in violation of the Florida
4 Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et*
5 *seq.*; (13) misleading advertisement in violation of the Florida Misleading
6 Advertising Law, Fla. Stat. § 817.41; and (14) unjust enrichment.⁴

7 Plaintiffs bring this action on behalf of all individuals who purchased Trump
8 University, LLC ("TU") real estate investing seminars. Plaintiffs' allegations
9 involve three tiers of programs: (1) the free preview; (2) a three-day fulfillment
10 seminar; and (3) Trump Elite programs.⁵ The TAC alleges that the Defendants
11 made material misrepresentations in advertisements, mailings, promotions and the
12 free preview to lead prospective customers to purchase Defendants' fulfillment and
13 elite programs. The named Plaintiffs paid anywhere from \$1,495 for a three-day
14 fulfillment seminar up to \$35,000 for the "Trump Gold Elite Program."

15 Plaintiffs allege TU and Donald Trump made the following common
16 misrepresentations in invitations, advertisements, and at the free program and
17 fulfillment seminar: (1) Trump University was an accredited university; (2)
18 students would be taught by real estate experts, professors and mentors hand-
19 selected by Mr. Trump; and (3) students would receive one year of expert support
20 and mentoring.⁶

21 **1. Allegations Against Donald J. Trump**

22 Defendant Donald Trump is a businessman, "real estate tycoon," author,
23 television personality and former presidential candidate. According to Mr. Trump,

24
25 ⁴ Unless otherwise indicated, each cause of action names both Trump University and
26 Donald J. Trump as a defendant, and all factual allegations are taken from the third amended
complaint. (Dkt. No. 128, "TAC.")

27 ⁵ The parties also refer to the TU seminars and programs as "Live Events."

28 ⁶ In the Third Amended Complaint, Plaintiffs alleged additional misrepresentations or
instances of deceptive behavior by TU instructors. However, in their recent filings and at the
November 8, 2013 hearing, Plaintiffs have narrowed their focus to the "core" misrepresentations
of Mr. Trump and whether Trump University was a "university."

1 estimates of the monetary value of the “Trump” brand have exceeded three billion
2 dollars. (Dkt. No. 122-4 at 49, “Trump Depo.”) Plaintiffs contend Defendant
3 Donald Trump is personally liable for the misrepresentations and misconduct at
4 issue because of his representations and involvement in Trump University.
5 Plaintiffs point to the following connections between Donald Trump and Trump
6 University:

- 7 • Donald Trump is the founder and Chairman of Trump University, and
8 authorized TU to use his name, photos, and quotes for all TU seminar
9 presentations;
- 10 • Print advertisements, email correspondence, letters, and TU website content
11 prominently feature Donald Trump’s quotes, image, logo, and signature;
- 12 • Donald Trump reviewed and authorized TU advertisement and content;
- 13 • Donald Trump personally financed Trump University, reviewed all TU
14 financial statements and print and mail advertisements; and
- 15 • Donald Trump represented that he personally hand-picked the TU instructors
16 and mentors.

14 2. Advertising, Website and Invitations to Free Preview

15 Plaintiffs allege TU relied on free introductory previews throughout the
16 United States in order to ensnare prospective customers through the use of
17 deception and misrepresentations. The free previews were preceded by an
18 orchestrated outreach campaign utilizing mailed invitations as well as a TU
19 website, Facebook page, radio, and newspaper advertising. (TAC ¶ 40; Dkt. No.
20 122-4 at 7, “Timeline for Preview.”) While the content of the materials varied,
21 Plaintiffs allege that all of the marketing materials uniformly referred to the
22 business as “Trump University.” Further, the materials uniformly claimed that
23 Donald Trump was integrally involved in the teaching of students at Trump
24 University. (TAC ¶¶ 40, 43.)

25 For example, print advertisements sent by TU included quotes such as “I can
26 turn anyone into a successful real estate investor, including you,” and “I’ll show
27 you how.” (TAC ¶¶ 19(c), (e).) The home page of the TU website displayed a large
28 photograph of Mr. Trump and the message: “Are YOU My Next Apprentice?”

1 Prove it to me!” Emails sent by TU to thousands stated “76% of the world’s
2 millionaires made their fortunes in real estate . . . I’m ready to teach you how to do
3 it too.” (TAC ¶ 19(d).) Print advertisements and letters signed by Mr. Trump told
4 prospective customers that they would be shown real estate strategies by Mr.
5 Trump’s “hand-picked experts.” (TAC ¶¶ 19(c), (f).)

6 3. The Free Preview

7 Plaintiffs assert that the purpose of the free preview was to “up-sell”
8 attendees to the \$1,495 Fulfillment Seminar, and that the goal of the \$1,495
9 Fulfillment Seminar was to up-sell participants to the Elite programs. (TAC ¶ 15.)
10 To advance the “up-sell” scheme, Defendants allegedly promised participants that
11 they would learn Trump’s secrets from Trump’s hand-picked instructors over the
12 course of a one-year apprenticeship. (TAC ¶ 43.) Plaintiffs cite to numerous
13 excerpts from transcripts of the free preview and three-day programs where
14 instructors repeated the claim that Mr. Trump hand-picked the instructors and
15 mentors. (Dkt. No. 195-3, “Pl. Reply, Ex. 88” at 594-605.)

16 However, Plaintiffs claim TU instructors and mentors were not hand-picked
17 by Mr. Trump. During discovery, Plaintiffs requested the names of Trump
18 University speakers, instructors and mentors that were hand-picked by Mr. Trump.
19 In interrogatory responses, Mr. Trump stated that he “personally was involved in
20 the selection of Don Sexton, Gary Eldred, Michael Gordon and Jack Kaplan.
21 Additionally, most if not all speakers, instructors and mentors were selected by
22 Trump University representatives . . .”. (Dkt. No. 195-5, “Jensen Decl. Ex. 105” at
23 5) (Response to Interrogatory No. 13). Don Sexton, Gary Eldred, Michael Gordon,
24 and Jack Kaplan are current or former professors who drafted and developed
25 Trump University course materials. (*Id.* at 3) (Response to Interrogatory No. 10).

26 4. Fulfillment Seminar

27 Individuals who paid for the Fulfillment Seminar were promised a three-day
28 seminar and one full year of expert interactive support. (TAC ¶ 53; Dkt. No. 195-3,

1 “Pl. Reply, Ex. 88” at 606-20.) Plaintiffs allege the seminar and year-long support
2 was actually a three-day infomercial accompanied by a phone number to call a
3 “client advisor.” (*Id.*) The TAC also claims that rather than teach customers
4 concrete real estate information, the Fulfillment Seminars were focused on trying
5 to “up-sell” customers the Trump Gold Elite Program for \$34,995 to get the “full
6 education.” (TAC ¶ 48.) At the Fulfillment Seminar, Plaintiffs allege TU
7 representatives pressured customers to raise their credit card limits to purchase
8 Trump Elite Programs. (TAC ¶ 49.)

9 **5. Trump Gold Elite Package**

10 Trump Gold Elite participants were allegedly promised unlimited mentoring
11 for an entire year. (TAC ¶ 53.) Plaintiffs allege that, in fact, Trump University told
12 its mentors that it would not pay them for more than six one-hour mentoring
13 sessions per consumer. (*Id.*)

14 **C. The Plaintiffs⁷**

15 The TAC was filed on behalf of six named plaintiffs located in California,
16 Missouri, Florida, and New York. The Plaintiffs are:

- 17 • Tarla Makaeff, a citizen of California, who purchased the three-day
18 fulfillment seminar in August 2008;
- 19 • Ed Oberkrom, a 65-year old senior citizen of St. Louis, Missouri, who
20 purchased the three-day seminar in February 2009 and the \$25,000
21 Elite seminar in March 2009. He attended the free preview after
22 reading and relying on Trump University advertisements;
- 23 • Sonny Low, a 71-year old senior citizen of San Diego, California,
24 who attended the free preview on or about November 18, 2009 after
25 learning about it in advertisements. Based on representations made at
26 the free preview, Low purchased the three-day seminar on or about

27
28 ⁷ The Court does not include Plaintiff Keller, as he does not seek to be a class
representative at this time. (Pl. Mtn. at 1.)

December 6, 2009 and then paid for the \$25,000 Elite seminar in December 2009;

- J.R. Everett, a 68-year old senior citizen of Tampa, Florida, who received an invitation to the free preview from Trump University which he attended on October 7, 2009. He then purchased the three-day seminar on or about October 7, 2009 and the \$35,000 Elite seminar on October 16, 2009; and
- John Brown, a 61 year old resident of New York, New York, who learned about the free preview in an advertisement and attended the free preview on September 14, 2009. He purchased the three-day seminar on or about September 14, 2009, and the \$25,000 Elite seminar on or about September 26, 2009. (TAC ¶¶ 26-31, 95-96, 106.)

Although Plaintiffs' specific experiences with TU seminars and programs vary, each Plaintiff allegedly purchased the Fulfillment Seminar and/or a Trump Elite program after exposure to representations made at a free preview.⁸ Plaintiffs contend that their experiences are typical of the proposed class, which consists of all persons who purchased TU Fulfillment Seminars or Elite programs throughout the United States from April 30, 2006 to the present. (Dkt. No. 195, "Pl. Reply," at 1-2.)

D. Proposed Common Evidence

1. Promotion of Trump University

From its inception in 2004 until 2010 when it changed its name to the Trump Initiative, "Trump University" was the chosen name for the real estate education business operated by Mr. Trump. A review of TU advertisements demonstrates that Trump University utilized various forms of recognizable signs to appear to be an accredited academic institution. TU used a school crest that was ubiquitous and

⁸ Although named plaintiff Tarla Makaeff did not personally attend a free preview, she was invited to a Fulfillment seminar for no cost to her by a friend who attended a free preview. At the Fulfillment seminar, Makaeff allegedly enrolled in an Elite program.

1 used on TU letterhead, power point presentations, promotional materials and
2 advertisements. (TAC ¶¶ 19, 42.)

3 In fact, Plaintiffs allege TU was never an accredited academic institution of
4 higher learning and that it was pressed by the New York Board of Education to
5 cease any claim to being a “university” in 2010. (TAC ¶ 2 n.1.)

6 **2. The Playbook**

7 Plaintiffs point to TU’s Playbook as the “single most important” common
8 evidence that the Live Events (TU seminars and programs) were standardized,
9 tightly controlled schemes with the goal to up-sell students. (Pl. Mtn at 6; Pl. Reply
10 at 11.)⁹ The 2010 Playbook is separated into three parts: (1) the “Preview
11 Playbook,” which addresses the free seminar; (2) the “Fulfillment Playbook,”
12 which addresses the three-day Fulfillment Seminar; and (3) the “Sales Playbook,”
13 which offers guidelines to sell TU products. (Dkt. No. 122-3, Ex. 8, “2010
14 Playbook.”)

15 The Preview Playbook includes timelines for advertising the free seminar in
16 the relevant market as well as detailed instructions for preparation and execution of
17 the free seminar. (Id. at TU 52945-52958.) The Fulfillment Playbook similarly
18 provides an overview and the administrative requirements to run a three-day
19 Fulfillment Seminar. (Id. at TU 52960.)

20 The Sales Playbook provides several guidelines for TU salespersons to sell
21 TU programs, including tips and scripts to help pitch TU products and services.
22 (Id. at TU 53061-53072.) For example, the Sales Playbook offers two scripts for
23 the salesperson to utilize during the seminars. The “Team Door Introduction
24 Script,” welcomes registrants with the following language: “Good
25 Afternoon/Evening! I would like to congratulate you on making it out today . . .

26 ⁹ Plaintiffs provide a copy of TU’s Playbooks for the years 2007, 2008, 2009 and 2010.
27 (Pl. Mtn., Ex. 12, 2010 Playbook; Pl. Reply, Exs. 75-77.) Although the Playbooks have some
28 differences, they utilize similar guidelines, instructions and techniques. The 2009 Playbook
incorporates sample TU advertisements and communications to market the Live Events that are
not included in the 2010 Playbook.

1 We have all been hand selected by Trump U and are experts in real estate
2 investing.” (Id. at TU 53040.) In a second script, the salesperson introduces the TU
3 instructor with the following language: “It is now my pleasure to introduce one of
4 Donald Trump’s top instructors. He has been hand selected because of his
5 expertise and knowledge in the real-estate business.” (Id. at TU 53041.) The 2010
6 Sales Playbook includes a script containing representations that the instructor was
7 “hand-picked” by Donald Trump. (Id. at TU 53041, 53062-63.) The 2009
8 Playbook includes sample advertisements that include the representation that
9 Donald Trump “handpicked” “world-class instructors.” (2009 Playbook at TU
10 130434, 130436.)

11 In addition, the Sales Playbook provides extensive talking points for the
12 salesperson to use during one-on-one sessions to sell additional TU products.
13 (2010 Playbook at TU 53042-53053.) The Playbook further directs instructors to
14 rank attendees as potential buyers based on their liquid assets. (Id. at TU 52969.)

15 TU required its Members to abide by all TU policies and instructions –
16 including the Playbook – regardless of whether individual employees in fact
17 followed specific TU policies. (See Pl. Mtn., Ex. 17, “Sexton Deposition I,”
18 196:16-198:10) (former TU President Michael Sexton testified that all instructors,
19 mentors and salespeople received the Playbook and were required to review the
20 contents); (Pl. Mtn. at 8; Pl. Mtn., Exs. 24, 27) (independent contractor agreements
21 requiring compliance with all TU directives, policies, and instructions).

22 **3. PowerPoint Presentations and Scripts**

23 As further common evidence of material misrepresentations, Plaintiffs offer
24 PowerPoint presentations and scripts that TU allegedly required instructors to
25 communicate a consistent message at all TU seminars. (Pl. Mtn. at 26; Pl. Reply at
26 6-7; Dkt. No. 239, “Supp. Doc.,” Ex. 2.) While the presentations vary depending
27 on the instructor and location of the seminar, the presentations share common
28 messages. Most PowerPoint presentations and/or scripts for the free orientation and

1 three-day Fulfillment Seminar: (1) bear the Trump University logo and promote an
2 image of Donald Trump; (2) state that the instructors were “hand-picked” or “hand
3 selected” by the Donald Trump or the “TU founders;” and (3) advertise the three-
4 day fulfillment seminar, one-year apprenticeship program, or Trump Elite
5 packages. (Dkt. No. 138, “Def. Opp.,” Ex. 39; Pl. Mtn., Exs. 40, 86, 87; Supp.
6 Doc., Ex. 2.) A small sampling of transcribed TU seminar recordings indicates that
7 several instructors made key statements at issue here, including the alleged
8 misrepresentation that instructors were “hand-picked” by Donald Trump and
9 students would receive one year of unlimited mentorship. (Pl. Reply, Ex. 88.)

10 II. DISCUSSION

11 A. Class Certification Standards

12 “The class action is an exception to the usual rule that litigation is conducted
13 by and on behalf of individual named parties only. In order to justify a departure
14 from that rule, a class representative must be a part of the class and possess the
15 same interest and suffer the same injury as the class members.” Wal-Mart Stores,
16 Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (internal quotation marks and citations
17 omitted). To fit within the exception, “a party seeking to maintain a class action
18 ‘must affirmatively demonstrate his compliance’ with [Federal Rule of Civil
19 Procedure] 23.” Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (quoting
20 Dukes, 131 S. Ct. at 2551–52).

21 Rule 23 contains two sets of requirements. First, “Rule 23(a) ensures that the
22 named plaintiffs are appropriate representatives of the class whose claims they
23 wish to litigate. The Rule’s four requirements—numerosity, commonality,
24 typicality, and adequate representation—effectively limit the class claims to those
25 fairly encompassed by the named plaintiff’s claims.” Dukes, 131 S. Ct. at 2550
26 (internal quotation marks and citations omitted). Second, “[w]here a putative class
27 satisfies all four requirements of 23(a), it still must meet at least one of the three
28

1 additional requirements outlined in 23(b).” United Steel, Paper & Forestry,
2 Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union AFL–CIO, CLC
3 v. ConocoPhillips Co., 593 F.3d 802, 806 (9th Cir. 2010).

4 On a motion for class certification, the Court is required to “examine the
5 merits of the underlying claim . . . only inasmuch as it must determine whether
6 common questions exist; not to determine whether class members could actually
7 prevail on the merits of their claims.” Ellis v. Costco Wholesale Corp., 657 F.3d
8 970, 981 n. 8 (9th Cir. 2011) (citations omitted).

9 To create a nationwide class, Plaintiffs have woven a quilt made up of
10 causes of action from all fifty states. The Plaintiffs’ trial plan seeks certification of
11 fourteen subclasses for deceptive trade practices, state elder abuse, and common
12 law claims of fraud, breach of contract, breach of covenant of good faith and fair
13 dealing, and unjust enrichment. (Dkt. No. 122-7.) Plaintiffs move to certify a
14 nationwide class of persons who purchased a Trump University 3-day live
15 “Fulfillment” workshop and/or a “Elite” program (collectively, “LiveEvents”)
16 within the applicable statute of limitations and have not received a full refund. (Pl.
17 Mtn at 4.)

18 For the reasons set out below, the Court will certify a class and five
19 subclasses of persons residing in California, New York and Florida who purchased
20 a Trump University 3-day live “Fulfillment” workshop and/or a “Elite” program
21 (“LiveEvents”) within the applicable statute of limitations and have not received a
22 full refund.

23 1. Rule 23(a)

24 The Court examines Plaintiffs’ showing on each of the requisite prongs of
25 Federal Rule of Civil Procedure 23, starting with Rule 23(a) requirements of
26 numerosity, commonality, typicality, and adequate representation.

27 ///

28 ///

1 **a. Numerosity**

2 To justify class certification, the Court must first find that the putative class
3 is “so numerous that joinder of all members is impracticable.” Fed. R. Civ. Proc.
4 23(a)(1). “Impracticability does not mean impossibility, [however,] . . . only . . .
5 difficulty or inconvenience in joining all members of the class.” Harris v. Palm
6 Springs Alpine Estates, Inc., 329 F.2d 909, 913–14 (9th Cir. 1964) (internal
7 quotations omitted). As a general rule, “classes of 40 or more are numerous
8 enough.” Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988)
9 (internal quotations and citations omitted).

10 Here, Plaintiffs estimate that potential class members of a nationwide class
11 number in the thousands. (Pl. Mtn. at 20) (“thousands of persons”); (Def. Opp. at
12 Ex. 6 ¶¶ a-c, Declaration of Mark Covais, Director of TU Operations, “Covais
13 Decl.”) (5,950 students paid between \$995 and \$1,995 for a three-day introductory
14 seminar). Based on both parties’ representations of the potential class size, the
15 Court concludes that the proposed class is sufficiently numerous.

16 Defendants assert that Plaintiffs have failed to make any showing of
17 numerosity for any subclass, whether by analysis, estimate, statistics, or otherwise.
18 Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981)
19 (“[w]hen a class is subdivided into subclasses, each subclass must independently
20 meet Rule 23 certification requirements.”). Plaintiffs estimate that the smallest
21 proposed subclass numbers “in the hundreds.” (Pl. Reply at 14.) The Court
22 concludes that the proposed subclasses are sufficiently numerous to make joinder
23 impractical. See Ornates-Hernandez v. Smith, 541 F. Supp. 351, 369 (C.D. Cal.
24 1982) (“Where the exact size of the class is unknown but general knowledge and
25 common sense indicate that it is large, the numerosity requirement is satisfied.”).

26 **b. Commonality**

27 Rule 23(a)(2) requires Plaintiff to demonstrate that “there are questions of
28 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). To show commonality,

1 class members must have “suffered the same injury.” Dukes, 131 S. Ct. at 2551
2 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)). The
3 commonality requirement demands only that “class members’ ‘situations share a
4 common issue of law or fact, and are sufficiently parallel to insure a vigorous and
5 full presentation of all claims for relief.’ ” Wolin v. Jaguar Land Rover N. Am.,
6 LLC, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting Cal. Rural Legal Assistance,
7 Inc. v. Legal Servs. Corp., 917 F.2d 1171, 1175 (9th Cir. 1990)). Plaintiffs must
8 demonstrate “the capacity of classwide proceedings to generate common answers”
9 to common questions of law or fact that are “apt to drive the resolution of the
10 litigation.” Dukes, 131 S. Ct. at 2551. “Dissimilarities within the proposed class
11 are what have the potential to impede the generation of common answers.” Id.

12 The Plaintiffs submit that all of the putative class members suffered financial
13 loss resulting from the purchase of TU Live Event programs following exposure to
14 deceptive advertisements and promotional statements. The following questions are
15 common to the proposed class: (1) whether Defendants misrepresented that Trump
16 University was an accredited university; (2) whether Defendants misrepresented
17 that Donald Trump was heavily involved in TU and “hand-picked” the TU
18 instructors; and (3) whether Defendants made misrepresentations about the “year-
19 long” mentoring and interactive support. These questions of fact are at the heart of
20 Plaintiffs’ common contention that Defendants misrepresented the benefits of TU’s
21 programs and services.

22 Defendants argue no common contention is shared by the potential class
23 members because TU student experiences varied by program, price, contract,
24 content, market, teacher, mentor and resulting individual performance. (Def. Opp.
25 at 18.) Defendants further contend that not all TU instructors or representatives
26 utilized the Playbook or spoke directly from TU talking points or scripts. However,
27 standing alone, this does not defeat commonality. See In re First Alliance Mortg.
28 Co., 471 F.3d 977, 990 (9th Cir. 2006) (concluding that misrepresentations for a

1 claim of fraud do not require verbatim recitation from a script to each class
2 member to satisfy the commonality threshold).

3 As further developed in the predominance discussion, the Court finds that
4 the tightly orchestrated promotional campaign exposed class members to the
5 alleged deceptive and misleading representations that are at issue here. A class
6 action has the ability to determine on a class wide basis whether misrepresentations
7 were made and whether they were material. Class treatment of the claims will
8 allow these common issues to be decided efficiently and economically.

9 **c. Typicality**

10 The Court must determine whether the claims or defenses of the
11 representative parties are typical of the claims or defenses of the class. Fed. R. Civ.
12 P. 23(a)(3). "Under the rule's permissive standards, representative claims are
13 'typical' if they are reasonably co-extensive with those of absent class members;
14 they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011,
15 1020 (9th Cir. 1998). "The purpose of the typicality requirement is to assure that
16 the interest of the named representative aligns with the interests of the class."
17 Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal citation
18 omitted). "The test of typicality is whether other members have the same or similar
19 injury, whether the action is based on conduct which is not unique to the named
20 plaintiffs, and whether other class members have been injured by the same course
21 of conduct." Id.

22 Plaintiffs argue their claims are typical because each proposed class member
23 was subjected to Defendants' fraudulent up-sell scheme and alleged
24 misrepresentations. (Pl. Mtn. at 30.) In response, Defendants contend Plaintiffs are
25 unique class representatives because: (1) each named Plaintiff purchased different
26 TU programs at prices that varied from most proposed class members; (2) each
27 named Plaintiff viewed different TU advertisements; and (3) each named Plaintiff
28 received different benefits from the TU programs. (Def. Opp. at 19-20.)

1 Upon review of the evidence, the Court concludes the Plaintiffs are not
2 unique class representatives. First, each proposed class representative purchased
3 TU's three-day fulfillment seminar for anywhere between \$750 and \$1,495. In
4 addition, the proposed class representatives purchased additional TU programs and
5 services.¹⁰ These purchases are sufficiently typical of the 1,661 other potential
6 class members who purchased additional TU products or services beyond the
7 three-day seminar. (Covais Decl. at ¶ 6(c).) Although the specific program, benefit,
8 or price of each TU product may vary, the nature of the claims are the same and
9 Plaintiffs' purchases of TU programs are typical to that of the proposed class
10 members.

11 Moreover, the nature of the claim is based on conduct which is not unique
12 to the proposed class representatives. Here, Plaintiffs' claim centers around
13 Defendants' allegedly fraudulent scheme to misrepresent the value and benefits of
14 TU's programs and services. The fact that each Plaintiff may have seen a different
15 advertisement, or no advertisement at all, does not defeat typicality. See Hanon,
16 976 F.2d at 508 ("Typicality refers to the nature of the claim or defense of the class
17 representative, and not to the specific facts from which it arose or the relief
18 sought") (internal citations and quotations omitted). As further explained in the
19 predominance analysis, the key in determining typicality and predominance is
20 determining the scope of the advertising and promotions and whether it is likely
21 that all class members were exposed to the allegedly material misrepresentations.

22
23
24 ¹⁰ (See Def. Opp., Ex. 55, Makaeff Deposition; Def. Opp., Ex. 57-5844, Low Deposition;
25 Def. Opp., Ex. 57-5848, Everett Deposition; Def. Opp., Ex. 58-5865, Oberkrom Enrollment
26 Form.) Some, in addition to the three-day seminar, purchased a form of "Elite" program.
27 Plaintiffs Oberkrom, Brown and Low paid anywhere between \$25,000 and \$25,995 for the Field
28 Mentorship program, a part of the Trump Elite program. (Def. Opp., Ex. 58-5867, Oberkrom
Enrollment Form; Def. Opp., Ex. 58-5869, Brown Enrollment Form; Def. Opp., Ex. 64-5942,
Low Deposition.) Similarly, Plaintiffs Makaeff and Everett purchased the Trump Gold Elite
package for \$34,995.¹⁰ (Def. Opp., Ex. 58-5857, Makaeff Enrollment Form.) These purchases
are typical of the 5,950 other potential class members who paid up to \$1,495 for TU's three-day
seminar. (Covais Decl. at ¶ 6(b).)

1 Defendants' conduct is not unique to the named Plaintiffs and the Court concludes
2 Plaintiffs have satisfied the typicality element of Rule 23(a).

3 **d. Adequate Representation**

4 Rule 23(a)(4) requires the representative parties to fairly and adequately
5 protect the interests of the class. Fed. R. Civ. P. 23(a)(4). "Adequate representation
6 'depends on the qualifications of counsel for the representatives, an absence of
7 antagonism, a sharing of interests between representatives and absentees, and the
8 unlikelihood that the suit is collusive.'" Crawford v. Honig, 37 F.3d 485, 487 (9th
9 Cir. 1994) (quoting Brown v. Tigor Title Ins. Co., 982 F.2d 386, 390 (9th Cir.
10 1992). Plaintiffs assert they are adequate class representatives who will protect the
11 interests of the class and class counsel will litigate this case vigorously. (Pl. Mtn. at
12 31.) Defendants do not dispute this element. The Court concludes that Plaintiffs,
13 except Ed Oberkrom, have sufficiently shown the representative parties will
14 protect the interests of the class.¹¹

15 **2. Rule 23(b)(3)**

16 Under Rule 23(b)(3), a plaintiff must show (i) "that the questions of law or
17 fact common to class members predominate over any questions affecting only
18 individual members," and (ii) that a class action is "superior to other available
19 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P.
20 23(b)(3). The Rule lists factors pertinent to a court's assessment of the
21 predominance and superiority criteria: (A) the interest of members of the class; (B)
22 the extent and nature of any litigation concerning the controversy already
23 commenced by or against members of the class; (C) the desirability of
24 concentrating the litigation of the claims in the particular forum; (D) the
25 difficulties likely to be encountered in the management of a class action. Fed. R.
26 Civ. P. 23(b)(3).

27 ¹¹ As further developed below, the Court finds that this case is not suitable for a
28 nationwide class action. Thus, proposed Plaintiff Ed Oberkrom, a resident of Missouri, is not an
adequate class representative for the approved California, New York and Florida classes.

1 **a. Whether Common Issues Predominate**

2 The central Rule 23(b)(3) inquiry is whether “the proposed classes are
3 sufficiently cohesive to warrant adjudication by representation.” Amchem
4 Products, Inc. v. Windsor, 521 U.S. 591, 594 (1997). If common questions
5 “present a significant aspect of the case and they can be resolved for all members
6 of the class in a single adjudication,” then “there is clear justification for handling
7 the dispute on a representative rather than on an individual basis,” and the
8 predominance test is satisfied. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th
9 Cir. 1998). “ ‘[I]f the main issues in a case require the separate adjudication of
10 each class member’s individual claim or defense, [however,] a Rule 23(b)(3) action
11 would be inappropriate.’ ” Zinser v. Accufix Research Institute, Inc., 253 F.3d
12 1180, 1190 (9th Cir. 2001) (quoting 7A Charles Alan Wright, Arthur R. Miller &
13 Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778,
14 at 535–39 (1986)).

15 Because the predominance requirement is “more demanding” than Rule
16 23(a)’s commonality requirement, the Court analyzes each claim for relief and
17 proposed subclass separately. See Amchem, 521 U.S. at 624.

18 **i. Unfair and Deceptive Trade Practices**

19 Plaintiffs seek to certify three subclasses under California, New York and
20 Florida state unfair competition statutes: (1) a subclass for California class
21 members for violations of California’s Unfair Competition Law (“UCL”), Cal.
22 Bus. & Prof. Code § 17200 *et seq.*; California’s False Advertising Law (“FAL”),
23 Bus. & Prof. Code § 17500 *et seq.*; and California’s Consumers Legal Remedies
24 Act (“CLRA”), Cal Civ. Code § 1750 *et seq.*; (2) a subclass for New York class
25 members under § 349 of New York’s General Business Law; and (3) a subclass for
26 Florida class members under the Florida Deceptive and Unfair Trade Practices Act
27 (“FDUTPA”), Fla. Stat. § 501.201, *et seq.* and § 817.41.

28 ///

aa. California Subclass

Plaintiffs first propose a California subclass for unfair and deceptive trade practices under California's UCL, CLRA, and FAL. (Dkt. No. 126-14, "Plaintiffs' Trial Plan" at 12.) Each of the claims under these statutes is predicated upon the alleged common misrepresentations identified above.

California UCL and FAL

California's UCL provides a cause of action for business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Cal. Bus. & Prof. Code § 17200 *et seq.* A cause of action under the "fraud" prong of the UCL requires only a showing that members of the public are "likely to be deceived," Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647-48 (1996), rather than "actually deceived or confused by the conduct or business practice in question," Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167 (2000). Relief under the UCL is available without any proof of deception, reliance, or damages. Brakke v. Econ. Concepts, Inc., 213 Cal. App. 4th 761, 772 (2013).

Similarly, California's FAL makes it unlawful for any business to disseminate any statement "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. "In determining whether a statement is misleading under the statute, the primary evidence in a false advertising case is the advertising itself." Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 679 (2006) (citing Brockey v. Moore, 107 Cal. App. 4th 86, 100 (2003)) (internal quotation marks omitted). Whether an advertisement is "misleading" must be judged by the effect it would have on a reasonable consumer. Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087 (9th Cir. 2010) ("consider the effect of misrepresentations upon a reasonable consumer, not a particular consumer") (internal quotation marks omitted); Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008). Liability under either the specific false advertising provisions

1 of the FAL or the broader provisions of the UCL may be found without any
2 individualized proof of deception and solely on the basis a defendant's conduct was
3 likely to deceive customers. Mass. Mutual Life Ins. Co. v. Superior Ct., 97 Cal.
4 App. 4th 1282, 1289 (2002).¹²

5 Defendants argue that the Plaintiffs have failed to provide documentary
6 proof of any "misrepresentation" and, instead, have provided a moving target of
7 claimed misrepresentations. (Def. Opp. at 11.) In addition, Defendants assert that
8 TU advertisements and promotional materials changed frequently, making it
9 unlikely that all of the putative class members were exposed to the same
10 representations. (Def. Opp. Ex. 135, "Sexton Depo." at 202:3-21.)

11 A review of the record reveals substantial evidence of common
12 misrepresentations made to all putative class members. These representations are
13 (1) Trump University was an accredited university; (2) students would be taught by
14 real estate experts, professors and mentors that were hand-picked by Donald
15 Trump; and (3) students would receive one year of expert support and mentoring.

16 Plaintiffs have provided evidence to show that Trump University was not an
17 accredited university; that the seminars were taught by individuals who were not
18 handpicked by Mr. Trump; and that the mentoring claims were false. In view of the
19 above, there is sufficient evidence that these common misrepresentations were
20 deceptive and misleading.

21
22 ¹² First, the California Supreme Court has held that plaintiffs need not show
23 individualized reliance to assert violations of California's UCL and FAL. In re Tobacco II Cases,
24 46 Cal. 4th 298, 312 (2009). "[W]hile a plaintiff must allege that the defendant's
25 misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not
26 required to allege that those misrepresentations were the sole or even the decisive cause of the
27 injury-producing conduct." Id. at 328. Thus, under California law, it "is not required to
28 necessarily plead and prove individualized reliance on specific misrepresentations or false
statements where [sic] misrepresentations and false statements were part of an extensive and
long-term advertising campaign." Id. Accordingly, "to state a claim under either the UCL or the
false advertising law, based on false advertising or promotional practices, it is necessary only to
show that members of the public are likely to be deceived." In re Tobacco II Cases, 46 Cal. 4th at
312. The Ninth Circuit has affirmed the California rule " 'that relief under the UCL is available
without individualized proof of deception, reliance and injury.' " Stearns v. Ticketmaster Corp.,
655 F.3d 1013, 1021 (9th Cir. 2011) (quoting In re Tobacco II, 46 Cal. 4th at 320).

1 Next, individualized determinations as to reliance and causation are not
2 required as long as certain facts exist to trigger the inferences and presumptions. A
3 key issue in all three consumer claims is whether class members were exposed to
4 the allegedly misleading advertisements. Davis–Miller v. Auto. Club of S. Cal.,
5 201 Cal. App. 4th 106, 125 (2011) (“An inference of classwide reliance cannot be
6 made where there is no evidence that the allegedly false representations were
7 uniformly made to all members of the proposed class.”); Cohen v. DIRECTV, Inc.,
8 178 Cal. App. 4th 966, 980 (2009) (“[California law does not] authorize an award .
9 . . on behalf of a consumer who was never exposed in any way to an allegedly
10 wrongful business practice.”). The Ninth Circuit has observed that “in the absence
11 of the kind of massive advertising campaign at issue in Tobacco II, the relevant
12 class must be defined in such a way as to include only members who were exposed
13 to advertising that is alleged to be materially misleading.” Mazza v. Am. Honda
14 Motor Co., Inc., 666 F.3d 581, 596 (9th Cir. 2012). In Mazza, the Ninth Circuit
15 found defendant Honda’s limited advertising campaign, in which “many class
16 members were never exposed to the allegedly misleading advertisement,” did not
17 justify a presumption of reliance. Id. In vacating class certification, the Ninth
18 Circuit concluded that the district court had certified an overly broad class where
19 “an individualized case must be made for each member showing reliance.” Id.

20 Defendants claim that there were no scripts or uniform promotional
21 materials containing any material misrepresentation. (Def. Opp. Ex. 135, “Sexton
22 Depo.” at 202:3-21; Dkt. No. 138-1, “Def. Opp, Ex. 22” a-d; Jamison ¶ 4, Peterson
23 ¶ 7, Horton ¶ 7 and Guarino ¶ 7.) As such, Defendants argue (1) the diversity of
24 TU students requires individualized inquiries; (2) individualized inquiries are
25 needed to prove each claim; (3) reliance on alleged verbal misrepresentations
26 requires individualized inquiry; and (4) the “presumption of reliance” does not
27 apply to prevent individual inquiry. (Def. Opp. at 21-30.)

1 The critical question in this case, as posed in Tobacco II, is whether the
2 putative class members were exposed to the same alleged misrepresentations. On
3 one hand, the advertising and promotional activities in the instant case were not
4 part of a massive advertising campaign. On the other hand, unlike the limited
5 advertising in Mazza, there is evidence that the TU multi-media promotional
6 campaign was uniform, highly orchestrated, concentrated and focused on its
7 intended audience.¹³ While it was not a long-term campaign as in Tobacco II, it
8 was much more targeted, concentrated, and efficient than Tobacco II. (See Pl.
9 Reply, Ex. 79, "Advertisement Chart.") The effect of this campaign was to make it
10 highly likely that each member of the putative class was exposed to the same
11 misrepresentations. There is substantial evidence that class members paid for TU
12 seminars for reasons that track the advertising and promotional information
13 provided in the highly orchestrated campaign. The Court finds substantial evidence
14 that members of the California subclass were "likely to be deceived" by TU's
15 advertisements. See In re Tobacco II Cases, 46 Cal. 4th at 298.

16 California CLRA

17 The CLRA prohibits "unfair methods of competition and unfair or deceptive
18 acts or practices." Cal. Civ. Code § 1770(a). The statute requires that plaintiffs in a
19 CLRA action "show not only that a defendant's conduct was deceptive but that the
20 deception caused the harm." In re Vioxx Class Cases, 180 Cal. App. 4th 116, 129
21 (2009). In a class action alleging violation of the CLRA, "[c]ausation, on a

22
23 ¹³ This evidence includes: (1) Letters signed by Donald Trump advertising the free
24 preview (Pl. Mtn., Exs. 29, 32, 34, 38); (2) Promotional videos of Donald Trump used at TU
25 seminars (Pl. Mtn., Exs. 1-2); (3) Website advertisements, (Pl. Mtn., Ex. 36), and Newspaper
26 ads, (Pl. Mtn., Ex. 37), featuring Donald Trump; and (4) Email advertisements (Pl. Mtn., Ex. 47).
27 (See Dkt. No. 122-7, Proposed Trial Plan at 3, n. 2.). In addition, the Playbook provides a two-
28 month timeline to advertise the free seminar in the relevant market. (2010 Playbook at TU
52946.) The "Pre-Event Timeline" includes the following instructions: 8 weeks prior to the
event, "Team Analyzes Market Data and History;" 3 and 2 weeks prior to the event, "Email sent
to TU Database;" 7-10 days prior to Event, "Direct Mail" and "Newspaper Ad;" and 1 week
prior to event: "Email to TU Database." (*Id.*) This timeline shows TU had a uniform strategy to
advertise the free seminar in each market by way of direct mail, email, and newspaper
advertisements.

1 classwide basis, may be established by *materiality*. If the trial court finds that
2 material misrepresentations have been made to the entire class, an inference of
3 **reliance arises as to the class.** *Id.* Stated differently, “**reliance on the alleged**
4 **misrepresentations may be inferred as to the entire class if the named plaintiff can**
5 **show that material misrepresentations were made to the class members.**” Chavez v.
6 Blue Sky Natural Bev., 268 F.R.D. 365, 376 (N.D. Cal. 2010). Under California
7 law, a misrepresentation or omission is material:

8 if a reasonable man would attach importance to its existence or
9 nonexistence in determining his choice of action in the transaction in
10 question, and as such materiality is generally a question of fact unless
11 the fact misrepresented is so obviously unimportant that the jury could
12 not reasonably find that a reasonable man would have been influenced
by it.

13 Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022 (9th Cir. 2011) cert. denied,
14 132 S. Ct. 1970 (2012) (internal citations omitted).

15 Defendants submit that there were no scripts or uniform promotional
16 materials containing any material misrepresentation and dispute that there is any
17 documentary evidence of any objective “misrepresentation.” (Def. Opp. at 11; Def.
18 Opp. Ex. 135, “Sexton Depo.” at 202:3-21.)

19 As fully discussed in the preceding section, there is substantial evidence that
20 TU made common misrepresentations to all of the class members. A jury could
21 find that a reasonable person would attach importance to these claims in deciding
22 to purchase a TU Live Event program. Consequently, the jury will be required to
23 decide this question of fact.

24 **bb. New York and Florida Subclasses**

25 The New York General Business law declares unlawful “[d]eceptive acts or
26 practices in the conduct of any business, trade or commerce or in the furnishing of
27 any service in th[e] state.” N.Y. Gen. Bus. Law § 349 (a). “As a threshold matter,
28 plaintiffs claiming the benefit of section 349 . . . must charge conduct of the

1 defendant that is consumer-oriented.” Oswego Laborers' Local 214 Pension Fund
2 v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25 (1995). “A prima facie case
3 requires as well a showing that defendant is engaging in an act or practice that is
4 deceptive or misleading in a material way and that plaintiff has been injured by
5 reason thereof.” Id. (internal citations omitted). New York courts have adopted “an
6 objective definition of deceptive acts and practices, whether representations or
7 omissions, limited to those likely to mislead a reasonable consumer acting
8 reasonably under the circumstances. Id. Moreover, “reliance is not an element of a
9 section 349 claim.” Stutman v. Chem. Bank, 95 N.Y.2d 24, 29 (2000) (internal
10 citations omitted).

11 Under Florida’s Deceptive and Unfair Trade Practices Act (FDUTPA),
12 “[u]nfair methods of competition, unconscionable acts or practices, and unfair or
13 deceptive acts or practices in the conduct of any trade or commerce,” are
14 considered unlawful. Fla. Stat. Ann. § 501.204 (1). A “consumer claim for
15 damages under FDUTPA has three elements: (1) a deceptive act or unfair practice;
16 (2) causation; and (3) actual damages.” Rollins, Inc. v. Butland, 951 So. 2d 860,
17 869 (Fla. Dist. Ct. App. 2006). “The Florida Supreme Court has noted that
18 deception occurs if there is a representation, omission, or practice that is likely to
19 mislead the consumer acting reasonably in the circumstances, to the consumer's
20 detriment. This standard requires a showing of probable, not possible, deception
21 that is likely to cause injury to a reasonable relying consumer.” Zlotnick v. Premier
22 Sales Grp., Inc., 480 F.3d 1281, 1284 (11th Cir. 2007) (internal quotation marks
23 and citations omitted).

24 This Court agrees with the California Central District that “[w]ith small
25 differences in wording, all three states [California, New York and Florida] appear
26 to employ the same causation and reliance standard [in their unfair trade and
27 competition laws].” Keegan v. Am. Honda Motor Co., Inc., 284 F.R.D. 504, 541
28 (C.D. Cal. 2012) leave to appeal denied, 12-80138, 2012 WL 7152289 (9th Cir.

1 Nov. 9, 2012). Based on the same showing of the UCL claims, the Court concludes
2 common issues predominate for alleged violations of New York General Business
3 law and the FDTUPA.

4 **ii. Financial Elder Abuse**

5 Plaintiffs propose two subclasses for financial elder abuse: (1) a California
6 subclass for violations of California Welfare & Institutions Code section 15610.30
7 (a)(1); and (2) a Florida subclass for violations of Florida Statutes section
8 501.2077(a).

9 As relevant here, California Welfare & Institutions Code section 15610.30
10 states in part:

11 (a) 'Financial abuse' of an elder occurs when a person or entity does
12 any of the following: (1) Takes, secretes, appropriates, obtains, or
13 retains real or personal property of an elder or dependent adult for a
14 wrongful use or with intent to defraud; (2) Assists in taking, secreting,
15 appropriating, obtaining, or retaining real or personal property of an
16 elder or dependent adult for a wrongful use or with intent to defraud,
17 or both; or (3) Takes, secretes, appropriates, obtains, or retains, or
18 assists in taking, secreting, appropriating, obtaining, or retaining, real
19 or personal property of an elder or dependent adult by undue
20 influence.

21 Cal. Welf. & Inst. Code § 15610.30 (a). For purposes of this section, "elder" means
22 any person residing in the state of California who is 65 years of age or older. Cal.
23 Welf. & Inst. Code § 15610.27. The statute defines two ways a person can "take,
24 secrete, appropriate, obtain or retain property." The first is when "the person or
25 entity knew or should have known that this conduct is likely to be harmful to the
26 elder or dependent adult," and the second is "when an elder or dependent adult is
27 deprived of any property right, including by means of an agreement, donative
28 transfer, or testamentary bequest, regardless of whether the property is held
directly or by a representative of an elder or dependent adult." Id. § 15610.30(b),
(c).

1 Under the FDUTPA, “[a] person who is willfully using, or has willfully
2 used, a method, act, or practice in violation of this part which victimizes or
3 attempts to victimize a senior citizen or a person who has a disability is liable for a
4 civil penalty of not more than \$15,000 for each such violation if she or he knew or
5 should have known that her or his conduct was unfair or deceptive.” Fla. Stat. Ann.
6 § 501.2077(2). For purposes of this section, “senior citizen” means a person who is
7 60 years of age or older. *Id.* § 501.2077(1)(a).

8 In the TAC, Plaintiffs allege that “Defendants took and/or assisted in the
9 taking of property from Plaintiff Low and all potential California class members
10 who are aged 65 or older with the intent to defraud.” (TAC ¶ 209.) To support the
11 FDUTPA claim, Plaintiffs allege Defendants “caused Plaintiff Everett and other
12 [Florida] class members to suffer substantial injury . . . [and] willfully used a
13 method, act or practice in violation of the FDUTPA, which . . . victimized or
14 attempted to victimize senior citizens.” (TAC ¶¶ 220, 223.)

15 Since the California Elder Abuse claim is premised on the same acts as the
16 UCL violations, discussed *supra*, the Court again finds that common questions
17 predominate. *See, e.g., In re Nat’l W. Life Ins. Deferred Annuities Litig.*, 268
18 F.R.D. 652, 669 (S.D. Cal. 2010) (finding common questions predominate where
19 California Elder Abuse claim was premised on the same acts for the UCL
20 violations). Similarly, violations of the FDUTPA allows for “a heightened civil
21 penalty if a senior citizen or handicapped person is victimized by fraud or
22 attempted fraud in a consumer transaction in violation of FDUTPA.” *In re Miller*,
23 418 B.R. 406, 412 (Bankr. N.D. Fla. 2009). As such, the Court finds common
24 issues predominate on both senior citizen subclasses.

25 **iii. Damages**

26 Defendants argue that individualized determinations will be required for the
27 Plaintiffs to establish damages. Defendants submit that even if some TU programs
28 are assumed to have a value less than their sale price, individual inquiry is still

1 needed to determine what value was actually obtained by students. (Defendant's
2 Opposition, p. 25.)

3 "At class certification, plaintiff must present a likely method for determining
4 class damages, though it is not necessary to show that his method will work with
5 certainty at this time." Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365,
6 379 (N.D. Cal. 2010) (internal quotations and citation omitted). Moreover, the
7 amount of damages, even if it is an individual question, does not defeat class
8 certification. Leyva v. Medline Indus. Inc., 716 F.3d 510, 513-14 (9th Cir. 2013)

9 At trial, Plaintiffs will seek a total, single monetary sum based on the
10 amount Plaintiffs and other class members paid, plus interest. (Proposed Trial Plan
11 at 1.) After trial, Plaintiffs propose a post-judgment administrative proceeding
12 where Defendants' records will be used to distribute checks to class members
13 based on the amount that they paid. Id.

14 When adjudication of questions of liability common to the class will achieve
15 economies of time and expense, the predominance standard is generally satisfied
16 even if damages are not provable in the aggregate. See Advisory Committee's 1966
17 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C. App. at 141 ("[A] fraud perpetrated on
18 numerous persons by the use of similar misrepresentations may be an appealing
19 situation for a class action, and it may remain so despite the need, if liability is
20 found, for separate determination of the damages suffered by individuals within the
21 class."); Wright, Miller, & Kane, 7AA Fed. Prac. & Proc. Civ. § 1781, at 235-37;
22 2 W. Rubenstein, Newberg on Class Actions § 4:54 at 205 (5th ed. 2012)
23 (ordinarily, "individual damage[s] calculations should not scuttle class certification
24 under Rule 23(b)(3)").

25 The Court finds that Plaintiffs' proposed method of calculating damages
26 does not defeat predominance or render the case unmanageable.

27 ///

28 ///

iv. Additional Common Law Claims

Plaintiffs seek certification of subclasses based on common law causes of action for the following claims: (1) breach of contract (fourth cause of action) and breach of implied covenant of good faith and fair dealing (fifth cause of action); (2) fraud (eighth cause of action); and (3) unjust enrichment (fourteenth cause of action).¹⁴

Plaintiffs bear the burden of showing uniformity or the existence of only a small number of applicable standards (i.e. “groupability”) among the laws of the fifty states. See, e.g., Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.). A district court must consider how variations in state law affect predominance and superiority. Id. at 1012. A proponent of a multi-state class action must “creditably demonstrate, through an ‘extensive analysis’ of state law variances, ‘that class certification does not present insuperable obstacles.’” Id. at 1017 (relying on In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)); see also Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377, 401–03 (D.N.J. 1998) (distinctions amongst members of the Class may be “compounded exponentially” by the application of law from various forums). In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.” Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996); Sikes v. Teleline, Inc., 281 F.3d 1350, 1367 n. 44 (9th Cir. 2002) (assuming trial court was correct in ruling that the laws of all fifty states apply, that alone would render the class unmanageable).

As summarized by the Defendants, “Plaintiffs propose no less than 14 subclasses covering all 50 states with overlapping claims – five of which are statutory (all limited to their state of origin) and nine of which are common law (spread over various combinations of states supposedly having materially identical

¹⁴ Plaintiffs do not seek class certification for the claims for money had and received (sixth cause of action), negligent representation (seventh cause of action), and false promise (ninth cause of action). (Pl. Mtn. at 13 n. 4.)

1 law)." (Def. Opp. at 33.) Given the wide range of claims and variance in state laws,
2 Defendants argue the class is unmanageable and therefore not the superior method
3 to adjudicate the action. (Id.)

4 As to all of Plaintiffs' common law claims, the Court agrees with
5 Defendants and further finds that common legal issues do not predominate.
6 Plaintiffs seek to certify the following subclasses:

- 7 - Two subclasses for fraud in the 28 states and the District of
8 Columbia that "permit reliance to be shown on a classwide
9 basis."
- 10 - Four subclasses for unjust enrichment for all 50 states and
11 the District of Columbia, with each subclass grouped to
12 correspond to "materially identical legal standards."
- 13 - Three subclasses for breach of implied covenant of good
14 faith and fair dealing in 29 states in which "the good faith
15 and fair dealing claims are subject to the elements of that
16 state's breach of contract claims."

17 (Proposed Trial Plan at 13-15.)

18 As a preliminary matter, Plaintiffs have failed to offer sufficient factual and
19 legal support to satisfy all prerequisites of Rules 23(a) and (b)(3) for these common
20 law claims. See Fed. Judicial Ctr., Manual for Complex Litigation (4th ed.) at §
21 21.23. Plaintiffs have provided a survey of the applicable common law of the 50
22 states and proposed verdict forms for the subclass causes of action. (Dkt. No. 122-
23 7, Exs. A-H.) However, the proposed verdict forms gloss over the differences in
24 the elements of each cause of action among the 50 states. Plaintiffs provide little, if
25 any, analysis to justify proposed verdict forms that do not track the elements of the
26 state causes of action. It is insufficient to merely refer the district court to densely
27 worded articles, graphs, and charts pertaining to each state's laws. Tylka v. Gerber
28 Prods. Co., 178 F.R.D. 493, 498 n. 3 (N.D. Ill. 1998) (proponents of fifty-state
class "should not expect the court to ferret through, disseminate, and craft
manageable schemes" from "densely worded articles, graphs, and charts, well in

1 excess of 100 pages” in support of such materials when that burden “clearly rests”
2 with the proponents).

3 Moreover, the Court finds the difficulties in class management are
4 compounded by several differences in substantive law for each state common law
5 claim. Manual for Complex Litigation § 21.222 (“The difficulties posed by
6 [differences in law] are likely to be compounded in nationwide or multistate class
7 action litigation raising state law claims or defenses. Differences in applicable law
8 and the number of divergent interests may lead a court to decline to certify a
9 class.”).

10 For example, Plaintiffs seek to certify two subclasses for common law fraud
11 claims in states that do not require individualized reliance. (Pl. Mtn. at 41.)
12 Plaintiffs claim that differences that exist among laws of various states can be
13 easily taken into account, and seek to rely on the Ninth Circuit’s approval of class
14 treatment for fraud claims that arise out of a “common course of conduct.” (Id.)
15 (quoting In re First Alliance Mortg. Co., 471 F.3d 977, 990 (9th Cir. 2006)).
16 Defendants respond that the element of reliance is crucial to common law fraud
17 and that individualized reliance issues defeat predominance for common law fraud.
18 (Def. Opp. at 42) (citing New York, Indiana, and Mississippi federal district court
19 cases).

20 The Court finds that although the Ninth Circuit has followed an approach
21 that “favors class treatment of fraud claims stemming from a common course of
22 conduct,” other circuits have “adopted somewhat different standards in identifying
23 the degree of factual commonality required in the misrepresentations to class
24 members in order to hold a defendant liable for class-wide fraud.” In re First
25 Alliance Mortg. Co., 471 F.3d at 990. In particular, the Ninth Circuit “common
26 course of conduct” approach differs from that of the Second and Third Circuits,
27 which both highlight “the importance of uniformity among representations made to
28 class members” to allow generalized proof to establish reliance. Id. at 990 n.3

1 (citing Moore v. PaineWebber, Inc., 306 F.3d 1247, 1255 (2d Cir. 2002); In re
2 LifeUSA Holding, Inc., 242 F.3d 136, 138-40 (3d Cir. 2001)). Although the
3 certification of subclasses may be appropriate where “applicable state laws can be
4 sorted into a small number of groups, each containing materially identical legal
5 standards,” Klay v. Haumana, Inc., 382 F.3d 1241 (11th Cir. 2004), the Court finds
6 that subclass certification for the fraud claim in this case is inappropriate.

7 In addition, as to the unjust enrichment claims, the common law in various
8 states is conflicting and would make trial unmanageable. The court in In re
9 Conagra Foods Inc., 908 F. Supp. 2d 1090, 1113-15 (C.D. Cal. 2012), surveyed the
10 conflicts in the law in California, Texas and Illinois as to whether unjust
11 enrichment constituted an independent claim or a remedy.¹⁵ These differences and

12
13 ¹⁵ California - See Ghirardo v. Antonioli, 14 Cal. 4th 39, 50, 54 (1996) (holding that a plaintiff
14 was “entitled to seek relief under traditional equitable principles of unjust enrichment” where
15 other remedies were unavailable and that a claim “ ‘for payment of money’ . . . rest[ed] on a
16 theory of unjust enrichment”); Melchior v. New Line Prod., Inc., 106 Cal. App. 4th 779, 793
17 (2003) (“The phrase ‘unjust enrichment’ does not describe a theory of recovery, but an effect: the
18 result of a failure to make restitution under circumstances where it is equitable to do so.”)
19 (quoting Lauriedale Assocs. Ltd. v. Wilson, 7 Cal. App. 4th 1439, 1448 (1992)).

20 Texas – A number of Texas courts have concluded that unjust enrichment is not an independent
21 claim under state law. See Show Serv., LLC v. Amber Trading Co. LLC, No. 3:09-CV-2385-D,
22 2010 WL 4392544 at *2 (N.D. Tex. Oct. 29, 2010) (citing, inter alia, Redwood Resort Props.,
23 LLC v. Holmes Co., No. 3:06-CV-1022-D, 2006 WL 3531422 at *9 (N.D. Tex. Nov. 27, 2006));
24 Celanese Corp. v. Coastal Water Auth., 475 F. Supp. 2d 623, 639 (S.D. Tex. 2007) (holding that
25 “[r]estitution and unjust enrichment are remedies, not causes of action”); Wood v. Gateway, Inc.,
26 No. 5:03-CV-007-C, 2003 WL 23109832 at *12 (N.D. Tex. Dec. 12, 2003). Others have treated
27 unjust enrichment as a cause of action. Pepi Corp. v. Galliford, 254 S.W.3d 457, 460 (Tex. App.
28 2007) (“Unjust enrichment is an independent cause of action”). The Texas Supreme Court has
not addressed the question directly, but has spoken of unjust enrichment as if it were an
independent cause of action. See HECI Exploration Co. v. Neel, 982 S.W.2d 881, 885 (Tex.
1998) (recognizing that a two-year statute of limitations governs “unjust enrichment” claims).

25 Illinois - As with California and Texas, Illinois courts appears divided as to whether unjust
26 enrichment is an independent cause of action. Compare Allstate Ins. Co. v. Morgan Guar. Trust
27 Co. of New York, No. 93 C 6527, 1994 WL 48585 at *4 (N.D. Ill. Feb. 16, 1994) (“unjust
28 enrichment is not a cognizable separate cause of action under Illinois law”) with Peddighaus v.
Peddighaus, 295 Ill. App. 3d 943, 949 (1998) (“Defendants contend Illinois does not recognize
an independent cause of action for unjust enrichment. We disagree. Our supreme court has
expressly held that to ‘state a cause of action based on a theory of unjust enrichment, a plaintiff

1 conflicts would require the Court to decide the applicable state law on unjust
2 enrichment claims in fifty states.

3 Similarly, the Court finds that the differences in the law and the facts
4 relating to the claims for breach of contract and breach of covenant of good faith
5 and fair dealing defeat the predominance that is required to certify a class. The
6 three proposed subclasses are based on states that recognize the breach of the
7 covenant of good faith as a separate cause of action and those that do not.

8 Given the numerous differences that exist as to the common law throughout
9 the fifty states and the number of proposed subclasses, the Court concludes that
10 common legal issues do not predominate as to the proposed common law
11 subclasses and nationwide class certification is not the superior method of
12 adjudicating these state common law claims.

13 **b. Whether Class Action is Superior to Other Methods of Adjudication**

14 Rule 23(b)(3) requires that class resolution must be “superior to other
15 available methods for the fair and efficient adjudication of the controversy.” Fed.
16 R. Civ. P. 23(b)(3). “The superiority inquiry under Rule 23(b)(3) requires
17 determination of whether the objectives of the particular class action procedure
18 will be achieved in the particular case.” Hanlon v. Chrysler Corp., 150 F.3d 1011,
19 1023 (9th Cir. 1998) (internal citation omitted). Two of the key factors to
20 determining superiority are the “extent and nature of any litigation concerning the
21 controversy already commenced by or against members of the class,” and “the
22 likely difficulties in managing a class action.” and Fed. R. Civ. P. 23(b)(3)(B), (D).

23 As noted above, Plaintiffs here have failed to show that a class action is the
24 superior method for litigating the state common law causes of action. However, the
25 Court does find that class litigation is superior to other methods of adjudication for

26
27 must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that
28 defendant's retention of the benefit violates the fundamental principles of justice, equity, and
good conscience, ’ ”) (quoting HPI Health Care Serv., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d
145, 160 (1989)).

1 two categories of claims: (1) claims for violations of California, New York and
2 Florida unfair and deceptive practices acts (first, second, third, tenth, twelfth and
3 thirteenth causes of action); and (2) financial elder abuse (eleventh and twelfth
4 causes of action). The Court notes that while individual class members' interests
5 are not minuscule, they have little interest in individually controlling actions based
6 on the potential amount in damages. Furthermore, because two of the subclasses
7 involve California consumers and California law, it is desirable to concentrate the
8 litigation in California.

9 As to the New York subclass, the Court notes that the New York Attorney
10 General has filed a recent case against TU. On October 10, 2013, Defendants filed
11 an ex parte request to file supplemental briefing on the issue of whether the
12 pending action in New York affects the superiority analysis for class certification
13 in this case.¹⁶ (Dkt. No. 272 at 2.) Defendants argue that the pending suit by the
14 New York Attorney General, seeking nationwide relief, defeats superiority for
15 Plaintiffs claims. (*Id.*) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (1975)).
16 However, *Kamm* involved the dismissal of a class action where the Attorney
17 General and the Real Estate Commissioner of California had brought a previous
18 suit that had already resulted in restitution to many class members; a permanent
19 injunction; and final judgment on a settlement agreement. 509 F.2d at 212. At this
20 time, no such lawsuit affects this current action.

21 The Court also notes that Plaintiffs' counsel has filed a related case, *Cohen*
22 *v. Trump*, 13-cv-2519-GPC-WVG, alleging violations of the Racketeer Influenced
23 and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). The Court
24 acknowledges that Rule 23(b)(3)(B) "is intended to serve the purpose of assuring
25 judicial economy and reducing the possibility of multiple lawsuits . . . If the court

26 ¹⁶ Defendants further filed a Notice of Supplemental Authority and Request for Judicial
27 Notice raising the same concern on January 31, 2014. (Dkt. No. 287.) Plaintiffs responded, (Dkt.
28 No. 288), and Defendants replied, (Dkt. No. 289). As Plaintiffs do not object to the propriety of
taking judicial notice of Defendants' offered authority, the Court grants the request for judicial
notice.

1 finds that several other actions already are pending and that a clear threat of
2 multiplicity and a risk of inconsistent adjudications actually exist, a class action
3 may not be appropriate.” Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180,
4 1191 opinion amended on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001) (internal
5 citations and quotations omitted). However, courts “often certify class actions
6 arising from similar facts.” Cartwright v. Viking Indus., Inc., 2009 WL 2982887,
7 *15 (E.D. Cal. 2009) (certifying a class for CLRA, UCL, fraudulent concealment,
8 unjust enrichment, and warranty claims despite a concurrent state court class action
9 certified for warranty claims); see also In re Wells Fargo Home Mortgage
10 Overtime Pay Litig., 527 F. Supp. 2d 1053, 1069 (N.D. Cal. 2007) (concurrent
11 FLSA and UCL class actions). Overall, the Court finds that class-wide litigation on
12 these claims will reduce litigation costs and promote greater efficiency. As such,
13 the Court finds the superiority requirement of Rule 23(b) is satisfied for these
14 claims.

15 3. Rule 23(g)

16 Rule 23(g)(1) requires the Court to appoint class counsel. Rule 23(g)
17 provides, *inter alia*, that courts must consider the following factors in appointing
18 class counsel: (i) the work counsel has done in identifying or investigating
19 potential claims in the action; (ii) counsel's experience in handling class actions,
20 other complex litigation, and the types of claims asserted in the action; (iii)
21 counsel's knowledge of the applicable law; and (iv) the resources that counsel will
22 commit to representing the class. Fed. R. Civ. P. 23(g).

23 The Court is satisfied that Plaintiffs’ counsel of record Zeldes Haeggquist &
24 Eck, LLP and Robbins Geller Rudman & Dowd LLP meet the criteria of Rule
25 23(b) and should serve as co-class counsel. (See Dkt. No. 122-6.)

26 B. Evidentiary Objections

27 In addition to the pending motion for class certification, the parties have
28 filed and fully briefed several related motions and objections:

1 1. Defendants' objections to evidence in Plaintiffs' motion for class
2 certification, (Dkt. No. 138-4, "Def. Obj. to Class Cert. Mtn.," 195-9, 213);

3 2. Defendants' motion to strike Plaintiffs' declarations, (Dkt. Nos. 138-
4 2, "Def. Mtn. to Strike," 192, 212);

5 3. Plaintiffs' motion to strike Defendants' declarations, (Dkt. Nos. 196,
6 "Pl. Mtn. to Strike," 210, 233);

7 4. Defendants' motion to strike and objections to improper evidence in
8 Plaintiffs' reply briefs supporting class certification, (Dkt. Nos. 211, "Def. Obj. to
9 Reply Mtn.," 221, 230).

10 A motion to certify a class is a preliminary procedure. As such, courts do not
11 require strict adherence to the Federal Rules of Procedure or the Federal Rules of
12 Evidence. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). Evidence
13 presented in support of class certification need not be admissible at trial.
14 Ralston v. Mortg. Investors Grp., 2012 WL 629238, *4 (N.D. Cal. 2012) Mazza v.
15 Am. Honda, 254 F.R.D. 273, 279 (C.D. Cal. 2008) (same); Amalgamated Transit
16 Union Local 1309 v. Laidlaw, 2009 WL 249888, *3 (S.D. Cal. 2009) (same).

17 In this matter, the parties have filed motions to strike declarations and
18 lodged evidentiary objections to evidence. At this stage of the proceedings, the
19 Court DENIES the motions to strike and overrules the evidentiary objections.

20 III. CONCLUSION AND ORDER

21 In accordance with the foregoing, Plaintiffs' motion for class certification is
22 **GRANTED** in part and **DENIED** in part. The Court hereby **GRANTS** Plaintiffs'
23 motion for class certification for the following class and subclasses:

24 All persons who purchased a Trump University three-day live
25 "Fulfillment" workshop and/or a "Elite" program ("Live
26 Events") in California, New York and Florida, and have not
27 received a full refund, divided into the following five
28 subclasses:

1 (1) a California UCL/CLRA/Misleading Advertisement
2 subclass of purchasers of the Trump University Fulfillment and
3 Elite Seminars who purchased the program in California within
4 the applicable statute of limitations;

5 (2) a California Financial Elder Abuse subclass of purchasers of
6 the Trump University Fulfillment and Elite Seminars who are
7 over the age of 65 years of age and purchased the program in
8 California within the applicable statute of limitations;

9 (3) a New York General Business Law § 349 subclass of
10 purchasers of the Trump University Fulfillment and Elite
11 Seminars who purchased the program in New York within the
12 applicable statute of limitations;

13 (4) a Florida Misleading Advertising Law subclass of
14 purchasers of the Trump University Fulfillment and Elite
15 Seminars who purchased the program in Florida within the
16 applicable statute of limitations; and

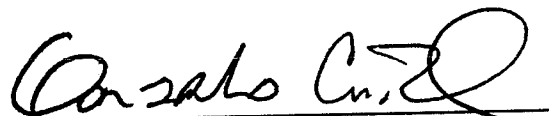
17 (5) a Florida Financial Elder Abuse subclass of purchasers of
18 the Trump University Fulfillment and Elite Seminars who are
19 over the age of 60 years of age and purchased the program in
20 Florida within the applicable statute of limitations.

21 Excluded from the class are Defendants, their officers and
22 directors, families and legal representatives, heirs, successors,
23 or assigns and any entity in which Defendants have a
24 controlling interest, any Judge assigned to this case and their
25 immediate families.

26 Additionally, the Court appoints Tarla Makaeff, Sonny Low, J.R. Everett
27 and John Brown as class representatives. Since Ed Oberkrom is not a resident of
28 California, New York, or Florida, the Court declines to appoint him as a class
representative. The Court appoints Robbins Geller Rudman & Dowd LLP and
Zeldes Haeggquist & Eck, as class counsel.

IT IS SO ORDERED.

Date: February 21, 2014



HON. GONZALO P. CURIEL
United States District Judge

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
✓ Federal Express

I, Stephen Moore, declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

On 03/07/2014 declarant served the within: Defendants' Petition for Permission to Appeal Pursuant to FRCP 23(f)
upon:

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I declare under penalty of perjury that the foregoing is true and correct:

Signature: Stephen Moore